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JURISDICTION BY NECESSITY—AN ANALYSIS OF THE *MULLANE* CASE

By GEORGE B. FRASER, JR.†

One of the most significant decisions of the last several years is the case of *Mullane v. Central Hanover Bank and Trust Company*.¹ In this case the Supreme Court of the United States had to determine when a court has jurisdiction to settle a trustee's account. However, in order to decide that question the Court had to consider two questions of even greater importance; first, may a court hear a case even though it has neither jurisdiction in personam nor jurisdiction in rem, and second, does notice by publication satisfy due process in actions that are not in personam. Since these two problems are basic to any discussion of jurisdiction, they will be discussed in this article along with the *Mullane* case itself.

I

An action to settle a trustee's account is brought to determine the propriety of the trustee's management of the trust funds.² If there has been any mismanagement, the trustee is personally liable for resulting loss. Therefore, when it settles his account, the court must litigate questions that affect the trustee's personal liability. This means that the court must have jurisdiction in personam of the trustee before it may hear such an action.³ Jurisdiction of the trustee also gives the court the exclusive right to control and administer the trust even

† A. B. 1936, Dartmouth College; LL. B. 1939, Harvard University; LL. M. 1941, George Washington University; Professor of Law, University of Oklahoma.

1. 339 U.S. 306 (1950). Hereinafter 339 U.S.

2. BOGERT, TRUSTS 461 (2d ed. 1942).

3. See *Roberts v. Michigan Trust Co.*, 273 Mich. 91, 262 N.W. 744 (1935). Since trustees are jointly and severally liable, it is not necessary for a court to have jurisdiction of all of them when there are several as it can proceed against those who have been properly served. 2 SCOTT, TRUSTS § 224.6 (1939).

though it does not have actual possession of the fund.⁴ For this reason, the Supreme Court held in *Princess Lida v. Thompson* that only one action to settle an account may be pending at any one time.⁵ In this case two trustees brought an action for the settlement of their account in the Common Pleas Court of Pennsylvania. The next day two beneficiaries brought suit in equity in the United States District Court for the Western District of Pennsylvania against the same trustees, alleging mismanagement of the trust funds and praying an account and surcharge. Thereafter the trustees moved to dismiss the bill in the federal court claiming that the state court had exclusive jurisdiction of the controversy. When the federal court refused to dismiss the action, the state court enjoined the beneficiaries from proceeding further in the federal court. This injunction was upheld by the Supreme Court of the United States, which stated:

"We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property."⁶

However, other suits to establish the right to an interest in the trust fund are permitted since they do not affect the management of the trust.⁷

Since two suits to settle an account may not exist at the same time, such proceedings are not true in personam actions because the existence of one action in personam does not prevent either party from bringing a second action for the same transaction. In *Kline v. Burke Construction Company* the Supreme Court stated, "the rule, therefore, has become generally established that where the action first brought is in per-

4. In *Commonwealth Co. v. Bradford*, 297 U.S. 613, 619 (1936), it was stated that "Property in its (the trustee's) possession is not *in custodia legis* as in case of receivers." However that difference does not prevent a court from exercising jurisdiction in rem. In *Glasser v. Wessel*, 152 F.2d 428, 430 (2d Cir. 1945), it was stated, "It would be indeed a feeble difference if the failure of the trustee to put the fund into the actual custody of the court, left it without jurisdiction to do what it could have done, if it had had that custody. It is well settled that, if it had had custody the judgment would have been good without personal service, so far as it undertook merely to determine interests in the fund."

5. 305 U.S. 456 (1939).

6. *Id.* at 466.

7. *Commonwealth Co. v. Bradford*, 297 U.S. 613 (1936); *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33 (1909).

sonam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.”⁸

The beneficiaries are the ones who will lose if the trust has been mismanaged. Therefore they may bring an action to compel the trustee to account and to surcharge him for any loss. They are also interested in any action for an accounting that is brought by the trustee. In the *Mullane* case the Supreme Court said:

“In two ways this proceeding [to settle the trustee’s account] does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairment of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.”⁹

For this reason it is usually stated that all the beneficiaries must be made parties to such an action or the decree settling the account will not be res judicata as to those who are not joined.¹⁰ In one case, which was brought by one of several beneficiaries, the court held that the other beneficiaries must be made parties to the action so that the trustee would not be harassed by a series of suits. The court stated that “Unless the remaining *cestuis que trustent* are made parties to the suit, they will not be bound by the accounting had in it, nor will they be bound by the ascertainment of the moneys that shall be decreed to be paid to the complainant.”¹¹ The court did not state what it meant when it held that the other beneficiaries must be made “parties to the suit.” Must they be served with process so that the court would have jurisdiction in personam of them? Usually a court must have jurisdiction in personam of both persons before it has the power to determine conclusively if one is liable to the other.¹² However most courts have held that it is only necessary to give the beneficiaries notice by publication.¹³ Whether or not this is sufficient was the subject of litigation in the *Mullane* case.¹⁴

8. 260 U.S. 226, 230 (1922).

9. 339 U.S. at 313.

10. See 2 SCOTT, TRUSTS § 260 (1939).

11. *Speakman v. Tatem*, 45 N.J. Eq. 388, 390, 17 Atl. 818, 819 (Ch. 1889).

12. *E.g.*, *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 522 (1916); *Brown v. Smart*, 145 U.S. 454, 458 (1892); *Maryland Casualty Co. v. Martin*, 88 N.H. 346, 347, 189 Atl. 162, 163 (1937).

13. *E.g.*, *Roberts v. Michigan Trust Co.*, 273 Mich. 91, 103, 262 N.W. 744, 748 (1935).

14. The appellant did not claim that the beneficiaries must be made parties to the action; he only challenged the method of giving notice to the beneficiaries. Brief for Appellant, p. 13. However, the Supreme Court itself raised this question, stating: “We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York.” 339 U.S. at 311.

This case involved a common trust fund composed of 113 participating trusts with numerous beneficiaries who were residents of different states. The fund was established under a statute which provided that at the time an investment is first made in a common trust fund the trustee must mail a notice to the beneficiaries of the individual estates or trusts whose money is being invested. This notice must contain a copy of the statutory provisions relating to the settlement of the trustee's accounts.¹⁵ According to these provisions a trustee must obtain a judicial settlement within twelve to fifteen months after the common trust fund is established and triennially thereafter.¹⁶ When such an action is begun, the trustee must publish a notice once a week for four weeks in a newspaper designated by the court. This notice must list the participating trusts, but it does not have to name either the beneficiaries or the donors of the trusts. In addition, the court must appoint two guardians, one for persons who have an interest in the income of the trust and one for persons who have an interest in the principal.¹⁷ The decree settling the account is conclusive as to any matter contained therein upon everyone having an interest in the common fund.¹⁸

The trustee in the *Mullane* case gave the required notice when the common trust fund was established. He also published the proper notice when he filed his account for settlement. In addition, the court appointed the necessary guardians. However, the beneficiaries were not subject to the jurisdiction of the court because they had not been served with process. Also they had not consented to be sued in New York. Yet the Supreme Court held that if they had been notified of the action the trial court could settle the account and bind them by the decree. Thus a court does not need personal jurisdiction of the beneficiaries in order to have the power to settle a trustee's account and to determine conclusively his liability for mismanagement.¹⁹

II

Since a court does not need jurisdiction in personam of the beneficiaries in order to bind them by a settlement of an account, is the action a proceeding in rem? Three things are necessary for an action in rem: the court must have control of a res, notice must be given to persons

15. N.Y. BANK. LAW § 100-c(9).

16. *Id.*, § 100-c(10).

17. *Id.*, § 100-c(12).

18. *Id.*, § 100-c(14).

19. Even then a beneficiary may reopen a decree for fraud or misrepresentation. 2 SCOTT, TRUSTS 1172 (1939). This same rule applies to executors and administrators. *MacKenzie v. Union Guardian Trust Co.*, 262 Mich. 563, 247 N.W. 914 (1933).

whose interests are affected, and the decree must affect the title or status of the property which is subject to the court's control.²⁰ In the *Mullane* case the court had control of the trust fund because the action was brought by the trustee. Therefore if the proper notice were given, the court would have the power to determine the title or status of the trust. Thus the court could determine who the beneficiaries were.²¹ However, the issue in the *Mullane* case did not affect the title of the trust; it only affected the trustee's personal obligation.

Personal obligations may be litigated in either an action in rem or an action quasi in rem if the res would be affected by the proceeding. Thus, in an action quasi in rem, a plaintiff may assert a claim against a person who is not a party to the action but who has an interest in the property that is subject to the jurisdiction of the court, even though the claim has no relationship to that property, because the property would be used to satisfy the obligation after it was established.²² However a court may not determine if a plaintiff is liable to the defendant because such an adjudication would not affect the title or status of any property. It would only affect the personal relationship between the two persons so that jurisdiction in personam would be necessary. The plaintiff's obligation, itself, may not be considered as a res for the purpose of giving the court jurisdiction to litigate the validity of that obligation. In *Maryland Casualty Company v. Martin*²³ an insurance company brought an action to determine if it were liable to certain defendants who were nonresidents. These defendants had not been served with process but had been notified of the action. The court held that this was not sufficient, stating that "Due process does not permit one denying himself to be a debtor to compel, by service outside his state, a nonresident claiming to be a creditor to have the liability adjudicated in the courts of that state."²⁴ This is the reason that a court does not have jurisdiction to interplead a nonresident claimant if a personal obligation is involved²⁵ although it may interplead a non-

20. Fraser, *Actions in Rem*, 34 CORNELL L.Q. 29 (1948).

21. Franz v. Buder, 11 F.2d 854 (8th Cir. 1926). In one case involving the settlement of an estate the court stated, "While the order of partial distribution of August 12, 1919, will protect the administrators in the disbursement of the funds of the estate to persons who were then in good faith believed to be the heirs of the deceased, this protection will not extend to protect one of such administrators in the disbursement of such funds to himself as such heir." *In re Coyne's Estate*, 103 Okla. 279, 283, 229 Pac. 630, 633 (1924).

22. *Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co.*, 285 Fed. 214 (6th Cir. 1922); see *Pennoyer v. Neff*, 95 U.S. 714 (1877).

23. 88 N.H. 346, 189 Atl. 162 (1937).

24. *Id.* at 347, 189 Atl. at 163.

25. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

resident claimant if tangible property is involved.²⁶ An obligation that is owed to the defendant by a third person may be the res for an action quasi in rem, as in garnishment proceedings. However, in that situation, the creditor is not the plaintiff.

When a court acting in rem litigates a personal obligation, the person against whom the claim is asserted is not bound by the decision as to his personal liability although he is bound by any disposition that is made of his property.²⁷ The personal obligation may be the subject of a later action.²⁸ This is illustrated by *Fitch v. Huntington* which involved a note secured by a mortgage on Iowa land.²⁹ When the mortgagee brought an action on the note in Wisconsin, the mortgagor claimed that this action was barred by a former action in Iowa in which the Iowa court, determining that the note had been discharged, removed the mortgage as a lien on the land. Since the mortgagee had not been a party to the Iowa action, the Wisconsin court rejected this defense holding that the decree cancelling the mortgage was binding on the plaintiff but that it could not affect the defendant's liability on the note.³⁰ This holding is in accord with *Riley v. New York Trust Company*. In that case the Supreme Court of the United States stated that an action in rem "does not bar litigation anew by a stranger, of facts upon which the decree *in rem* is based."³¹

Since a decree settling an account does not affect title to property, a court acting in rem would not have jurisdiction of such a proceeding. Also, a decree settling an account is different from a decree in rem because it bars further litigation of a personal obligation. Therefore, the *Mullane* case was neither in personam nor in rem. This was pointed

26. See *Glasser v. Wessel*, 152 F.2d 428, 430 (2d Cir 1945), in which a trust fund was considered as a tangible res. However, a claimant who is not subject to the jurisdiction of the court will not be prevented from asserting a claim against the stakeholder. *Hanna v. Stedman*, 230 N.Y. 326, 130 N.E. 566 (1921).

27. The defendant may still be bound by the issues litigated if he appears specially. *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94 (1939). *Contra*: *Cheshire National Bank v. Jaynes*, 224 Mass. 14, 112 N.E. 500 (1916).

28. *Brigham v. Fayerweather*, 140 Mass. 411, 5 N.E. 265 (1886). *RESTATEMENT, JUDGMENTS* § 73(2) (1942). Even the plaintiff in an action in rem may later bring an action on the same cause of action if jurisdiction is in personam or based on power over different property. *Van Horst v. Thompson*, 18 F.2d 177 (D.C. Cir. 1927).

29. 125 Wis. 204, 102 N.W. 1066 (1905).

30. The court stated: "The Iowa court held that the note had been discharged, but this holding was only effective so far as it formed a basis for removing the lien. It had no effect upon the personal liability or the note, because the man who held title to that personal liability was not before the court, except by substituted service, and his rights to enforce that personal liability could not be affected." *Id.* at 208, 102 N.W. at 1067.

31. 315 U.S. 343, 353 (1942). Therefore if a court grants interpleader when it has jurisdiction in rem the claimant may still sue the stakeholder in an action in personam. See note 26 *supra*.

out by the Supreme Court when it stated that, "It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some of the characteristics and is wanting in some features of proceedings both *in rem* and *in personam*." ³² Thus a court must be exercising a third type of jurisdiction when it settles a trustee's account.

III

As indicated by the previous section, the *Mullane* case permits a court to adjudicate conclusively the relations between two persons even though one of them is not a party to the action. Although this is unusual, it is permitted in a few situations when it is impossible to obtain jurisdiction in personam and the question must be litigated. For instance, it would usually be impossible to settle a trustee's account if total jurisdiction in personam were necessary because there would be no one place where the trustee could get jurisdiction of all the beneficiaries. The common fund in the *Mullane* case, for example, consisted of 113 participating trusts with numerous beneficiaries who were residents of different states. The Supreme Court recognized this need when it stated:

"It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." ³³

Actions for a divorce are also examples of jurisdiction by necessity. They do not involve a res but only affect the personal relations of the parties. Therefore, they are not in rem. The Supreme Court recently stated, "The historical view that a proceeding for a divorce was a proceeding *in rem* . . . was rejected by the *Haddock* case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action." ³⁴ For this reason a court may grant a divorce although the defendant spouse is not made

32. 339 U.S. at 312.

33. *Id.* at 313. This argument would seem to apply with almost as much force to interpleader actions except that the necessity is not so great since the passage of the Federal Interpleader Act.

34. *Williams v. North Carolina*, 317 U.S. 287, 297 (1942).

a party to the action if he is a nonresident who cannot be served with process. Similarly a court has jurisdiction of an adoption proceeding even though the natural parent is a nonresident.³⁵

In each of these cases the court is terminating an existing relationship with a nonresident. The interest that a state has in its citizens gives it the power to do this in spite of the fact that it deprives the nonresident of certain benefits that might result from the relationship.³⁶ However, this interest will not permit a court to terminate all obligations that are owed by resident plaintiffs to nonresidents who are not parties to the action. In *Estin v. Estin* the Supreme Court held that a court does not have the power to terminate the plaintiff's obligation to pay support money to a spouse who had not been served with process even though it could grant a divorce.³⁷ Also, a court cannot determine that a relationship exists between the plaintiff and a nonresident defendant who is not served with process because the effect of such a determination would be to impose a legal obligation on a person who is not a party to the action. Thus a court cannot determine that the plaintiff is married to a nonresident. Also it cannot declare that a nonresident is the plaintiff's father. In the recent case of *In re Hindi* the Supreme Court of Arizona held that a court could determine the parentage of a child only if it had jurisdiction in personam of the alleged father.³⁸ The opposite result was reached by a California Superior Court on the ground that the action was in rem.³⁹ However, no property was subject to the jurisdiction of the court nor would any property be affected by the decree, so the court was not acting in rem. There are cases in which the Supreme Court of the United States has gone further in imposing a liability on nonresident defendants. Cases involving nonresident motorists are illustrations.⁴⁰ In such cases jurisdiction is based on acts done within the state although the fiction of an agency relationship is used. However, even this theory would not support the California case because the defendant had never been in California.

35. *Stearns v. Allen*, 183 Mass. 404, 67 N.E. 349 (1903). See RESTATEMENT, CONFLICT OF LAWS § 142 (1934).

36. "The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation. . . . They entitle the State of the domicile to bring in the absent spouse through constructive service." *Estin v. Estin*, 334 U.S. 541, 546 (1948).

37. 334 U.S. 541 (1948).

38. 71 Ariz. 17, 222 P.2d 991 (1950).

39. This case is unreported; however, for further proceedings in connection with the same action see *Hammerstein v. Superior Court of California*, 341 U.S. 491 (1951).

40. *E.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927).

IV

Although it is not necessary to make the beneficiaries of a trust parties to an action to settle the trustee's account, the *Mullane* case held that they are not bound by the decree unless they are notified of the proceeding and given a chance to be heard. This is a basic requirement of due process. No specific method of giving notice need be used provided the method adopted is "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁴¹ Therefore, the notice that was given when the common trust fund was established was not sufficient because it did not advise the beneficiaries of the time and place of action.⁴² Also, the notice by publication that was given when the trustee brought his action for a judicial settlement of his account was not sufficient for beneficiaries who had a present interest in the trust and whose addresses were known. The Court stated:

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed."⁴³

It also added:

"Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests."⁴⁴

Therefore, notice by mail was suggested as a more desirable means of advising the beneficiaries. "However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication."⁴⁵ The fact that postal notification was used at the time the common trust fund was established indicated to the Court that it would not be a serious burden to require that it be used at the time of an accounting.

41. 339 U.S. at 314.

42. *Id.* at 318.

43. *Id.* at 315.

44. *Id.* at 320.

45. *Id.* at 319.

The Court did say that notice by publication would be sufficient if reinforced by other acts, as by an attachment, but there was nothing in the *Mullane* case that would reinforce the publication. Possession by the trustee did not have this effect because the trustee had possession of the trust fund prior to the commencement of the action. The opinion stated that ". . . it is their caretaker who in the accounting becomes their adversary."⁴⁶ Even the appointment of the guardians was not sufficient to reinforce the publication because it did not have the effect of advising the beneficiaries of the proceeding. Therefore, the case was reversed as to beneficiaries who had a present interest in the trust and whose addresses were known.

The Supreme Court held that notice by publication is sufficient for persons whose addresses are unknown as there is no other way to notify them. Also, notice by publication is sufficient for persons whose interests "are either conjectural or future" if other persons who are interested in the same subject matter are given better notice, because these latter persons would protect the interests of those who are given notice by publication. Therefore, in the *Mullane* case, appellant's objections to notice by publication were overruled in so far as they related to beneficiaries whose interests or addresses were unknown.

The *Mullane* case is the latest in a series of decisions that have discussed the kind of notice that must be given in actions in rem. In *Cooper v. Reynolds*⁴⁷ the Supreme Court held that seizure of the property was in itself sufficient to give notice of such an action. A few years later in *Windsor v. McVeigh*⁴⁸ the Court held that seizure alone was not sufficient because it did not supply any information about the time and place of the hearing. "The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential."⁴⁹ In addition, the notice must indicate that the defendant's property is involved. If the plaintiff is enforcing an existing interest in land, as in an action to foreclose a lien or to obtain specific performance of a land sale contract, information about the action itself will indicate that specific property will be affected by the result. However, if the action is quasi in rem, there must either be seizure of the property or the notice must show that specific property is involved

46. *Id.* at 316.

47. 10 Wall. 308 (U.S. 1870).

48. 93 U.S. 274 (1876).

49. *Id.* at 279.

because a description of the action itself will not convey that information.⁵⁰

Prior to the *Mullane* case there had been very little discussion of the method that should be employed to give notice provided some kind of notice was given. In *McDonald v. Mabee* the Supreme Court held that notice by publication is not sufficient to give a court jurisdiction in personam of a defendant who has left a state intending not to return.⁵¹ The Court stated, "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."⁵² However, in actions in rem, the Supreme Court has upheld notice by publication without considering if another method of giving notice would be more adequate or if the publication was reinforced by other acts. In *Arndt v. Griggs* the Court stated, "These various decisions of this court establish that, in its judgment, a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication; and that is all that is necessary to sustain the validity of the decree in question in this case."⁵³ There is nothing in the opinion to indicate that the defendant's address was unknown. The plaintiff had to give an affidavit that the defendant could not be found within the state, but this does not mean that he could not be located. Also, there was nothing that would reinforce the publication. The plaintiff was in possession of the land but that does not reinforce the publication because he had been in possession of it prior to the commencement of the action so that no change of possession occurred at the time the action was begun. The statute provided that the judgment could be opened within five years; however, that provision is meaningless if a defendant has no notice of the action. State courts have not followed *Arndt v. Griggs* but have held that notice by publication is not usually sufficient. In *Hollis v. Tilton* the Supreme Court of New Hampshire stated that "In general, constructive notice as by publication, is insufficient if personal notice in some form is reasonably practical."⁵⁴

50. Compare *Roller v. Holly*, 176 U.S. 398 (1900), with *Pennoyer v. Neff*, 95 U.S. 714 (1877).

51. 243 U.S. 90 (1917).

52. *Id.* at 92.

53. 134 U.S. 316, 327 (1890). In this case the question of jurisdiction was raised in a collateral proceeding, whereas in the *Mullane* case it was raised by appeal. Cf. *Tannhauser v. Adams*, 182 P.2d 280 (Cal. Dist. Ct. App.), *aff'd on other grounds*, 31 Cal.2d 169, 187 P.2d 716 (1947), in which a California District Court of Appeals held that the publication of a delinquent tax list was sufficient notice of a tax sale even though the statute provided for notice by publication and by mail.

54. 5 A.2d 29, 32, *modified on other grounds*, 6 A.2d 753 (N.H. 1939). In *People v. One 1941 Chrysler 6 Tour Sedan*, 180 P.2d 780, 788, *rehearing*, 183 P.2d

V

In the *Mullane* case the Supreme Court was interpreting the due process clause. Therefore the holding that notice by publication is unsatisfactory applies to all types of proceedings where notice must be given to persons whose interests are affected. For this reason, the effect of this holding on other types of actions will be considered.

Statutes in many states only require a person to post or publish notice of a probate proceeding. These statutes do not satisfy the requirements of due process because such notice does not advise heirs and next of kin that a probate proceeding is pending. Possession of the decedent's property by the executor or administrator does not reinforce notice by posting or publication because the property was not taken from the possession of the heirs or next of kin. Thus the fact that the personal representative has possession of the decedent's property is no more significant than was the trustee's possession of the trust fund in the *Mullane* case.

Since a probate proceeding consists of several distinct steps, a second problem arises. Must notice of each step be given, or is notice at the beginning sufficient for the whole proceeding? In the *Mullane* case the Supreme Court held that the notice that was given when an investment was first made in a common trust fund was insufficient to satisfy due process even though the beneficiaries were advised that the trustee must account within twelve to fifteen months and triennially thereafter. Similarly, notice at the beginning of a probate proceeding is not sufficient notice of future hearings because it does not advise persons whose interests are affected when these various hearings will occur. Therefore, a separate notice of each phase of a probate proceeding must be given. *Michigan Trust Company v. Ferry*⁵⁵ is often cited for the proposition that notice at the beginning is sufficient in states whose statutes make a probate proceeding a single action.⁵⁶ However, this case does not discuss the necessity of notice for successive stages of a probate proceeding. It holds that a court does not have to obtain service of process on a person it appoints as executor in order to surcharge him. Ferry was appointed executor by a Michigan court. Later, proceedings were begun in the same court to remove him and to obtain an accounting. Ferry had moved to Utah so he was not served with

368, 378 (Cal. Dist. Ct. App. 1947), the court stated, "Due process is a variable concept. Whether it has been violated depends upon the facts of the case. Where alternatives are given it requires that that alternative reasonably calculated to notify the person affected must be used."

55. 228 U.S. 346 (1913).

56. E.g., Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675, 689 (1945); Comment, 50 MICH. L. REV. 124, 137 (1951).

process, but he was given actual notice of this proceeding. The Michigan court found that Ferry was liable to the estate and rendered judgment against him. In an action on the judgment which was begun in Utah, it was held that the judgment was unenforceable because Ferry was not served with process when the Michigan action was begun. This holding was reversed by the Supreme Court of the United States on the ground that a court has jurisdiction of an executor from the time of his appointment. The Court emphasized that the Michigan proceeding was in accordance with due process because actual notice was given.

Notice by publication is usually permitted in divorce cases when the defendant is a nonresident. However, its use when the defendant's address is known violates the rule in the *Mullane* case because such notice is not likely "to appraise interested parties of the pendency of the action." When a defendant's address is unknown, publication is the only possible method of giving notice because no attachment or other method of seizure is possible; but this should not justify the use of notice by publication when the defendant's address is known. At the same time that it grants a divorce, a court may award defendant's property to the plaintiff. If the property is located within the state and proper notice has been given, a court has the power to do this. However, before such action is taken, the defendant should be notified that the plaintiff is not only seeking a divorce but is asserting a claim against his property. Either notice by mail or seizure of the property and notice by publication would be sufficient. If the property is already in the possession of the plaintiff, the latter method would not be sufficient since there would be no change of possession at the time the action is brought. However, if the defendant's address is unknown, notice by publication must be used.

Most states require that a notice be mailed to the defendant in a divorce action. Also, if property is involved, both the petition and the notice must indicate that fact and the property must be attached.⁵⁷ However, some cases hold that notice by publication is sufficient even when a better method of giving notice could be used.⁵⁸

Custody and adoption proceedings are similar to divorce actions in that the decree either limits or completely terminates an existing relationship—usually the parent-child relationship—between two persons. Therefore, the natural parent must be notified of the pendency of such

57. *Forrester v. Forrester*, 155 Ga. 722, 118 S.E. 373 (1923); *Geary v. Geary*, 272 N.Y. 390, 6 N.E.2d 67 (1936).

58. *Wesner v. O'Brien*, 56 Kan. 724, 44 Pac. 1090 (1896); *Closson v. Closson*, 30 Wyo. 1, 215 Pac. 485 (1923).

an action.⁵⁹ Even when he has been deprived of the custody of his child by a prior judicial proceeding, the parent is usually given notice of a subsequent suit for adoption.⁶⁰ Thus in *Ex parte Parker*⁶¹ the Supreme Court of Oklahoma held that a mother was entitled to notice of an adoption proceeding even though custody of the child had been awarded to an association and the statute provided that service on the association was sufficient to authorize the court to hear the matter.⁶² This holding is correct because a legal relation still existed between them. As one Texas case pointed out, the father could still inherit from the child.⁶³ Also, the parent should have a chance to be heard on the question of what is best for the child. Moreover, notice of one action is insufficient to constitute notice of a subsequent proceeding that may be brought months and perhaps years later. Therefore, this case is in accord with the *Mullane* case. However, one court held that notice was not necessary because the statute did not require consent.⁶⁴ Unfortunately this court confused two different problems, consent and notice. By misconduct the parent may lose the right to object to the adoption of his child, but he is still entitled to notice prior to the complete severance of the parent-child relationship. If the parent has been deprived of custody because he abandoned the child, it is usually stated that he is not entitled to notice of the adoption proceeding,⁶⁵ although he must be given notice of the prior action so that he may be heard on the issue of abandonment.⁶⁶ This holding is wrong because the natural parent is still entitled to notice unless the prior proceeding completely terminated the parent-child relationship.⁶⁷

When it is necessary to give notice to a natural parent who is a nonresident, the rules laid down in the *Mullane* case as to the proper method of giving notice should be followed. If his address is known, the parent should be given personal notice or mailed notice. If his address is unknown, notice by publication must be used. Unfortunately many statutes authorize notice by publication when notice by mail could be given. One court has even held that where the statute required

59. In *Fielding v. Highsmith*, 152 Fla. 837, 840, 13 So.2d 208, 209 (1943), the court stated, "Even where adoption statutes do not specifically require personal notice to be given, it must be presumed that the legislature intended that the natural parents should have an opportunity to be heard before having their rights to the child declared forfeited; if such statutes are to be upheld as constitutional."

60. *Rubendall v. Bisterfelt*, 227 Iowa 1388, 291 N.W. 401 (1940); *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922).

61. 195 Okla. 224, 156 P.2d 584 (1945).

62. 10 OKLA. STAT. § 110 (1941).

63. *Pearce v. Harris*, 134 S.W.2d 859 (Tex. Ct. Civ. App. 1939).

64. *In re Hardesty's Adoption*, 150 Kan. 271, 92 P.2d 49 (1939).

65. *In re Asterbloom's Adoption*, 63 Nev. 190, 165 P.2d 157 (1946); cf. *Hersey v. Hersey*, 271 Mass. 545, 171 N.E. 815 (1930).

66. *State ex rel. Thompson v. District Court*, 75 Mont. 147, 242 Pac. 959 (1926); *Schiltz v. Roenitz*, 86 Wis. 31, 56 N.W. 194 (1893).

67. See *Fielding v. Highsmith*, 152 Fla. 837, 840, 13 So.2d 208, 209 (1943).

either personal service or notice by publication notice by mail is insufficient.⁶⁸

In guardianship cases a different problem is presented. Actual notice is insufficient because of the ward's incapacity, therefore a guardian *ad litem* should be appointed prior to the settlement of the guardian's account in order to satisfy due process.⁶⁹ This is not inconsistent with the *Mullane* case even though in that case the appointment of the guardian was held to be insufficient to constitute due process. It only indicates that due process depends on the circumstances of each case. When a person is not subject to any legal disability, a reasonable effort to give actual notice must be made. When a person is subject to a disability, a guardian must be appointed to protect his interests. This is true in all types of cases, not just guardianship cases.

In actions to quiet title notice by publication is subject to the same objection that is raised in other cases where it is used; that is, persons whose interests are affected are not likely to know that the action is pending. Even though a court is acting in rem, persons whose claims constitute a cloud on the plaintiff's title should be given personal notice or notice by mail if their address is known. The fact that the claimant is in possession of the property is not sufficient to reinforce notice by publication since no change of possession occurs at the time the action is brought. Notice by publication is also insufficient in actions for specific performance of land sale contracts when the court is acting in rem unless it is reinforced by seizure of the property.

CONCLUSION

To settle a trustee's account a court must have jurisdiction in personam of the trustee, but personal jurisdiction of the beneficiaries is not necessary. However, the beneficiaries must be notified of the proceeding. According to the *Mullane* case notice by publication is not sufficient to satisfy due process if a more adequate means is available. This is true not only for actions to settle a trustee's account but for all types of proceedings where it is necessary to give notice to persons whose interests will be affected by an action. Thus, jurisdiction is not based on power alone. Fairness to both parties is becoming the major consideration in determining if a court has jurisdiction of a case. In fact, where it is reasonable and necessary, a court may act even though it has no power over the defendant.

68. *In re Ives*, 314 Mich. 690, 23 N.W.2d 131 (1946).

69. It was first held in *Hollis v. Tilton*, 90 N.H. 119, 5 A.2d 29 (1939), that the appointment of a guardian *ad litem* was a constitutional requirement. On rehearing the court held that the constitution did not require the appointment of a guardian, but, "in the exercise of reasonable discretion one must be appointed." 6 A.2d 753 (1939).